No. 91-538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FORSYTH COUNTY, GEORGIA,

Petitioner,

v.

THE NATIONALIST MOVEMENT,

Respondent.

REPLY BRIEF FOR PETITIONER

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STATEMENT OF THE CASE

Petitioner adopts in full its Statement of the Case set forth in its Brief @ 1-15.

ARGUMENT

I. ORDINANCE 34 DOES NOT IMPOSE A PRIOR RESTRAINT ON THE EXERCISE OF PROTECTED EXPRESSION NOR DOES IT INCORPORATE A DE FACTO HECKLER'S VETO

The overriding theme found in the positions of the Movement and its Amici Curiae is that Ordinance 34's sliding scale of fees for "the maintenance of public order" incorporates a de facto heckler's veto so as to increase the fee to be paid by one with a controversial message. Recognizing that their complaints may only be addressed if this Court acknowledges the Movement's standing to attack the Ordinance on its face, this Court should reject such meritless concerns because of Ordinance 34's cap on license fees, which provides ample protection against excessive costs and because of the availability of indigency provisions for those who qualify for indigency treatment. Moreover, the record before this Court demonstrates that the County only assessed a $100 fee, one tenth of the maximum fee, for the proposed rally by the Movement.

A brief analysis of the primary authority cited by the Movement and its supporters reveals that those cases review statutes and ordinances which are patently content or speech specific and which, for the most part,

criminalize certain speech or conduct based on its effect on others. For example, Coates v. City of Cincinnati, 402 U.S. 611 (1971), struck down an ordinance prohibiting three or more persons from engaging in annoying conduct on public streets because its standards for determining what is "annoying" were nonexistent and because it violated the right to free assembly and association. "Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of...constitutional freedoms." Id. @ 615. The record clearly reflects that such "public intolerance or animosity" was not the basis for Ordinance 34. County Brief @ 6-7.

Similarly, Gooding v. Wilson, 405 U.S. 518 (1972), struck down Georgia's abusive language statute as overbroad because it was not limited by Georgia case law to "fighting words." Brandenburg v. Ohio, 395 U.S. 444 (1969), struck down Ohio's criminal syndicate act which imposed criminal penalties for "mere advocacy" of violence without distinguishing between such advocacy and preparation for violent acts. Cantwell v. Connecticut, 310 U.S. 296 (1940), invalidated a statute which penalized religious evangelism to one not of the same religion or sect. The Court found no breach of the peace even though the message may have angered listeners which, unlike the statute being reviewed, were content neutral. Finally, in Terminiello v. City of Chicago, 337 U.S. 1 (1949), arguably the seminal heckler's veto case, the Court reversed a conviction of a

speaker whose speech was found to have "stirred people to anger, invited public dispute, or brought about a condition of unrest." Id. @ 4.

All of the foregoing cases are directly content based attacks on free expression which criminalized specific speech or conduct based on a rationale of protecting listeners from unpleasant views. Such cases simply provide no basis for invalidating the fee provision of Ordinance 34.

The Movement and some of its Amici have cited NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), as support for their position against any monetary payment by demonstrators who may economically harm others as a result of their message, whether intentional or otherwise. There the Court set aside a damage award against the NAACP as a result of losses to businesses subjected to a boycott. Nonetheless, the Court recognized a "strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association." Id. @ 912. The Court also noted that

> we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment

freedoms is no greater than is essential to the furtherance of that interest.

458 U.S. @ 912, fn 47, citing U.S. v. O'Brien, 391 U.S. 367, 376-377 (1968).

Amicus ACLU likens the fee provision to the insurance provision struck down in Collin v. Smith, 578 F.2d 1197, 1208-1209 (1978), cert. denied, 439 U.S. 916 (1978), as indicative of other lower courts' rejection of advance fee provisions in free expression cases. It should be noted at the outset that this Court has never cited Collin with approval. While Collin represents the only decision by a federal appellate court outside the Eleventh Circuit which even arguably impacts on the fee provision of Ordinance 34, even Collin distinguished the insurance provision from a fee scheme like that approved in Cox v. New Hampshire, 312 U.S. 569 (1941). Furthermore the Village of Skokie conceded that the insurance provision could not be applied to the Nazis in that instance and the decision regarding the insurance provision was limited to an as applied holding. In any event, the Dissent forcefully argues that the Cox rationale should have upheld the insurance provision. 578 F.2d @ 1214. In the final analysis, an unattainable insurance policy differs from the County's fee provision of Ordinance 34 because apparently there as no indigency provision if a policy could not be obtained, whereas the fee provisions of Ordinance 34 may be waived for indigent individuals.

II. REVIEW OF THE COUNTY'S INDIGENCY PROVISION IS NOT PROPERLY BEFORE THE COURT.

The Movement and its Amici have suggested to this Court that the fee provision of Ordinance 34, however small, may shut out indigents. They attempt to inject an issue which was specifically not ruled on by the lower court and which is not properly before this Court. P.C. App. @ 31, fn. 8.

However, the existence of the indigency provision in Ordinance 34, section 3(7), P.C. App. @ 119-120, distinguishes this case from any of the cases which are advanced by the Movement as modern free speech cases which should cause this Court to reject is holding in Cox. Those cases, Little v. Streater, 452 U.S. 1 (1981), Lubin v. Panish, 415 U.S. 709 (1974), Bulloch v. Carter, 405 U.S. 134 (1972), Boddie v. Connecticut, 401 U.S. 371 (1971), and Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), all illustrated how rights of indigents could be abridged by unavailability of funds, a problem not faced by indigent individuals applying for a permit to demonstrate in Forsyth County, Georgia.

The Movement is not an individual, however, but a corporation not entitled to indigency treatment under Ordinance 34, nor under the filing provisions of the federal courts. Title 28 U.S.C. § 1915; Nationalist Movement v. City of Cumming et al, Case No. 89-8417 (11th Cir., Sept. 8, 1989), cert. denied, ___ U.S. ___, 111 S.Ct. 767 (1991); FDM Manufacturing Co. v. Scottsdale

Insurance Co., 855 F.2d 213 (5th Cir. 1988).

III. THE MOTIVATION FOR ENACTMENT OF ORDINANCE 34 WAS PURE, HAVING NOTHING TO DO WITH CONTENT OF EXPRESSION.

The Movement has directly attacked the County's motivation based on argument of counsel in the Court below. It is elementary that argument of counsel is not evidence, but only an attempt at persuasion and justification for a position. Argument of counsel does not supplant the unrebutted evidence of the County's purposes for enactment of Ordinance 34, which had nothing to do with the content of expression. See County Brief @ 6-7.

Allusions to the Stamp Act as support for the Movement's positions are also unavailing. A useful discussion of the Stamp Act and its use in free expression jurisprudence is found in Grosjean v. America Press Co., 297 U.S. 233 (1936), where this Court invalidated a tax on newspaper publishers having a certain circulation because motivation for the tax was similar to the Stamp Act where "revenue was of subordinate concern; and...the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs." Id. @ 247. There is no evidence whatsoever that such a motivation underlies Ordinance 34.

IV. ORDINANCE 34 DOES NOT IMPERMISSIBLY DISCRIMINATE AGAINST GROUP EXPRESSION.

The Movement alleges that Ordinance 34 infringes upon freedom of association by differentiating between groups of individuals more than three in number and groups of individuals less than four in number. Movement Brief @ 30-31, fn. 16. Thus the argument apparently condemns charging a permit fee for four persons to demonstrate, but not for one, two or three persons, because three or less persons are not required to obtain a permit or pay a fee.

The County is entitled to make a general legislative determination as to when expressive activity impacts the County fisc by causing administrative effort and public safety costs. The County's determination was that three or fewer individuals cause no administrative effort and probably do not impact public safety concerns at all; thus there is generally no need for governmental involvement. At some level that changes; the County has made that break at four individuals. Any fee would, at such a low level, be nominal, growing as administrative effort and public safety concerns escalate.

The Movement cites Chief Justice Burger's quotation from Citizens Against Rent Control, etc. v. City of Berkeley, 454 U.S. 290, 296 (1981), out of context. In that case Justice Burger states that "any limit - on individuals wishing to band together to advance their views...while placing none on individuals acting alone, is

clearly a restraint on the right of association." Ordinance 34 places no requirement for a permit on two or three persons, only on more than three persons. Thus, associational rights are not the basis for Ordinance 34's distinction between less than three persons and more than three persons. Instead, Ordinance 34's distinction is based upon a determination as to the point where there is impact on county responsibility for action to regulate and protect demonstrators. More importantly, the requirement to obtain a permit or pay a fee does not "hobble" associational rights as was found in Citizens Against Rent Control, where contributions exceeding $250.00 from any single contributor, including associational groups such as corporations and associations, were prohibited.

Also cited by the Movement is In Re Primus, 436 U.S. 412 (1978), where disciplinary action against solicitation by an attorney for a non-profit legal service organization was invalidated. The Court expressly permitted states to fashion reasonable restrictions with respect to time, place and manner of solicitation by members of the Bar. Id. @ 438.

Thus, the Movement's attempt to drag associational discrimination into this case is unavailing and seeks to distract the Court from the true issue before it: The continued vitality of the principles expressed in Cox v. New Hampshire, 312 U.S. 569 (1941).

V. THE CONTINUED VITALITY OF MURDOCK V. PENNSYLVANIA, 319 U.S. 105 (1943), IS QUESTIONABLE AND SHOULD FORECLOSE ANY ARGUMENT THAT ITS HOLDING LIMITS COX V. NEW HAMPSHIRE, 312 U.S. 569 (1941).

The County has previously distinguished this Court's holding in Murdock from that of Cox. County Brief @ 32-34. This Court has recently expressly "limit[ed] Murdock...to apply only where a flat license tax operates as a prior restraint on the free exercise of religious belief." Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 110 S.Ct. 688, 695 (1990) (emphasis added). Amicus ACLU apparently fails to note the fundamental distinction between a tax and a regulatory fee noted by Justice Douglas in Murdock when it cites Jimmy Swaggart Ministries as support for the Movement's position. ACLU Brief @ 16.

VI. ORDINANCE 34'S FEE IS A USER FEE, NOT AN ATTEMPT TO COLLECT COST OF SERVICES FROM A TORTFEASOR.

The Movement and certain of its Amici liken the County's fee to an attempt to collect costs of services from tortfeasors whose actions necessitate public expenditures. District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984); City of Flagstaff v. A.T. & Santa Fe Ry Co., 719 F.2d 322 (9th Cir. 1983); see also, O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979).

These federal appellate decisions provide no support for invalidating Ordinance 34.

In Air Florida, the court recognized government's right to recover expenses to protect its property. That right should allow government to maintain fiscal responsibility in order to carry out its public protection duties. Conscious failure or fiscal inability to protect demonstrators may expose government property (i.e. public funds) to seizure following suits by those injured when inadequate protection is afforded demonstrators. In City of Flagstaff, the court noted that Arizona tort law did not foreclose government's right to recover costs of its services where such recovery was authorized by statute or regulation. Id. @ 324. Reliance by the Movement on O'Hair is also misplaced. That case dealt with whether allowing the Pope to perform a Mass on the Mall which government partially funded violated the Established Clause of the First Amendment. The Court found it did not while noting the Catholic Church's expenditure of $400,000.00 in assisting the Department of Interior with preparation costs. Id. @ 933, 936.

The Movement's attempt to insert tort theory into this constitutional issue is without merit and should be rejected.

CONCLUSION

For the reasons stated herein and in Petitioner's Brief, Forsyth County respectfully requests that this Court reverse the decision of the Eleventh Circuit holding Ordinance 34 unconstitutional on its face, hold

that Ordinance 34 is constitutional as applied to the Movement, and remand this case to the Eleventh Circuit Court of Appeals with directions to affirm the opinion handed down by the United States District Court for the Northern District of Georgia.

Respectfully submitted this 24th day of March, 1992.

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